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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

In these proceedings, the Bells have argued that the Commission can and should eliminate cost-based unbundled access to the "platform" of network elements ("UNE-P"). CompTel and others have previously demonstrated at length that acceptance of this argument would eliminate existing local competition and impede investment in alternative local transmission and switching facilities. In this letter, CompTel writes to make a different point. Whatever the significance of UNE-P for *local* competition, its continuation is imperative for the protection of the existing vibrant competition in the provision of *long distance* services. In this regard, the Bells' proposals are plainly antithetical to § 271 of the Communications Act and to the Commission's decisions granting the Bells entry into the long distance market pursuant to that statute. As CompTel explains below, these orders were predicated on the availability of UNE-P at TELRIC-based rates to competitive carriers because, absent this entry vehicle, the Bells would be able to remonopolize long distance services, particularly those provided to residential and small business customers. Having obtained entry into the long distance market on the basis of the broad availability of UNE-P, the Bells cannot now be heard to argue for its abolition.

The basic bargain struck by Congress in the 1996 Telecommunications Act was to make the Bells' entry into the long distance market the *quid pro quo* for enabling long distance carriers to offer ubiquitous local service. Congress understood that the Bells can enter the long distance markets without making any capital investment in alternative transmission and switching facilities by reselling the services of existing long distance carriers. In particular, in 1996, the existence of multiple national long distance networks and of established systems that allow consumers seamlessly to change their long distance carriers had guaranteed that Bell Companies

could obtain long distance capacity at wholesale at very low rates and without incurring any significant costs.

At the same time, Congress understood that allowing Bells to provide long distance services would severely impair competition in that market *unless* there were mechanisms that would make it as easy and as economic for interexchange carriers ("IXCs") ubiquitously to provide local services as it was for the Bells to provide long distance.[1] The fundamental reality is that residential and small business customers generally want to obtain local and long distance service from a single source, and unless IXCs can economically provide local service to particular classes of customers, the Bells will monopolize their in-region long distance markets. The Bells candidly state that "bundling is the lifeblood of how we'll grow our business in the residential market."[2] Further, if IXCs cannot obtain local exchange facilities in commercial volumes at their economic cost and are required to pay inflated access charges, their long distances services will be subject to price squeezes, or other forms of input foreclosure. For these reasons, the D.C. Court of Appeals had held, before the 1996 Act was passed, that so long as the Bells "enjoy a monopoly on local calls" they will "ineluctably leverage that bottleneck control in the interexchange (long distance) market" if they are free to offer long distance services.[3] And that is why in the 1996 Act "Congress chose to maintain . . . the MFJ's [long distance] restrictions . . . until the BOCs open their local markets to competition."[4]

In the intervening years, market experience has vividly confirmed these judicial and congressional findings. In those markets to which § 271 does not apply and where incumbents were free to provide long distance services without offering UNE-P upon reasonable terms and conditions, the Bells have in a very short time monopolized long distance services. For example, in Connecticut, SNET has acquired a 60 percent share of the long distance business in a few years time.[5] In contrast, in states such as New York where UNE-P has been available on more

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[1] This can be seen clearly in the legislative history of the 1996 Act. *See, e.g.*, 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan) ("The Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service."); S. 652, 104th Cong., § 5(3) (1995) ("[b]ecause of their monopoly status, local telephone companies and the [BOCs] have been prevented from competing in certain markets") (emphasis added); 141 Cong. Rec. S8138 (1995) (statement of Sen. Kerrey) ("[t]he question is whether or not to grant long-distance competitive opportunity, and that question is answered by determining whether or not there is competition at the local level"); 141 Cong. Rec. H8281 (1995) (statement of Rep. Bliley) ("[o]nce the [BOCs] open the local exchange networks to competition, the Bell companies are free to compete in the long distance and manufacturing markets").

[2] *See* http://news.findlaw.com/ap_stories/high_tech/1700/11-17-2002/20021117120015_59.html (statement of Verizon spokesman Bill Kula).

[3] *United States v. Western Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992).

[4] *Qwest Teaming Order* ¶ 5.

[5] *Ex Parte* Declaration of Lee Selwyn, CC Docket No. 96-149, ¶¶ 12-15 (Nov. 14, 2002).

reasonable terms, the Bells have been forced to compete on a more level field and, while their advantages as the incumbent local monopolist have enabled them to garner extraordinary shares of long distance business in short periods of time (*e.g.*, 29 percent in two years), IXCs and other competitive carriers have been able ubiquitously to respond by offering their own packages of local and long distance services and to prevent Bells from remonopolizing long distance services.

In its decisions under § 271, the Commission has recognized that it cannot grant long distance authority to a BOC unless IXCs and other competitive carriers have the ability ubiquitously to offer local competition on economic terms throughout the particular state. Because it is wholly infeasible for IXCs and competitive carriers immediately to offer broad-based services to residential and small business customers through alternative loop, transport, or switching elements, the orders have been critically dependent on findings that UNE-P at TELRIC rates was available throughout the state on terms that would allow IXCs economically to provide broad-based local competition *coincident* with the Bell's authorization to provide long distance service. And it is precisely because UNE-P is the only viable mechanism for introducing widespread and effective local competition – thereby protecting long distance competition on the merits – that the demonstrated availability of cost-based UNE-P has been an essential prerequisite for § 271 relief. Notably, the Commission's orders rely on UNE-P to satisfy each of three basic statutory preconditions to a grant of long distance authority: (1) the Track A requirement of facilities-based service provided to both residential and business customers; (2) the requirements of the checklist that minimum conditions for local entry have been met; and (3) the additional requirements that must be satisfied before grant of an application can be found to be in the "public interest."

First, the Commission has determined that the existence of UNE-P competition is highly relevant for determining whether a Bell satisfies the requirements of "Track A" of § 271. "To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of 'telephone exchange service . . . to residential and business subscribers'" who are "predominantly" providing these services over their own facilities.[6] In implementing this provision, the Commission has found that Track A requires the Bell to establish an interconnection agreement with competitive carriers that provide an "actual commercial alternative" to the Bell for both residential and business services.[7] Because, except for cable companies in a few limited circumstances, competitive carriers have not deployed their own facilities to serve the mass market and because UNE-P "leases" give competitive carriers property interests in facilities, the Bells have argued – and the Commission has accepted – that statistics showing competitive carriers are serving residential customers using UNE-P competition shows the existence of "actual commercial alternative[s]" for these customers and, therefore, satisfies the Track A requirement.[8]

Second, the Commission has refused to find that a Bell's OSS system satisfies the competitive checklist unless the Bell demonstrates an adequate interface for the ordering and

[6] *Kansas-Oklahoma 271 Order* ¶ 40 (quoting 47 U.S.C. § 271(d)(3)(A)).

[7] *Id.* ¶ 42.

[8] *See, e.g., id.*; *Georgia-Louisiana 271 Order* ¶¶ 13, 15; *New Jersey 271* Order ¶ 11.

provisioning of UNE-P to the mass market at all commercially obtainable volumes of orders.[9] "Deploying the necessary OSS functions that allow competing carriers to order network elements and combinations of network elements and receive the associated billing information is critical to provisioning those network elements."[10] Absent the availability of OSS capable of supporting a UNE-P offer to the mass market, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing in the local exchange market," for IXCs and other competitive carriers will be incapable of offering local service to residential and small business customers throughout the state.[11]

The Commission's § 271 decisions make a second critical point relating to OSS. For the Commission to conclude that a Bell is providing the required access to unbundled network elements it needs to establish that its OSS works to provide competitors a meaningful ability to compete with the Bell.[12] In a mass market setting where there will be tens of thousands of transactions daily, that virtually requires electronic processing of orders and provisioning of facilities, and the Commission accordingly has repeatedly rejected § 271 applications when the Bells did not have reliable electronic systems in place to support the pre-ordering, ordering and provisioning of UNE-P, since "excessive reliance on manual processing, especially for routine transactions, impedes the BOC's ability to provide equivalent access to [] fundamental operational support systems."[13] Indeed, the Commission began to permit the BOCs to enter the long-distance market only *after* the Bell UNE-P processes became electronic and standardized.[14] Moreover, when the Bells had relied on collocation as the sole method to combine elements, the Commission rejected the Bells' applications, because the manual processing and increased cost of providing service failed to satisfy the requirements of § 271.[15] And the Commission required either substantial commercial usage,[16] or extensive "stress testing" reviewed by independent third parties,[17] before it would conclude that the Bells actually were able to provision the elements or element combinations as required by law.

Alternatively, the Commission *could have* chosen the path to disallow § 271 relief to the Bell companies until such time as they demonstrated that they could electronically or otherwise transfer loops to competitive facilities in a manner that removed the significant economic impairments associated with competitors obtaining access to last mile facilities. If the Commission had done so, none of the Bell companies to date would have received § 271 relief,

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[9] *See, e.g., Georgia-Louisiana 271 Order* ¶¶ 103, 122-26, 136, 151, 155; *Kansas-Oklahoma 271 Order* ¶ 158; *Massachusetts 271 Order* ¶¶ 78-80; *Michigan 271 Order* ¶ 128.

[10] *Michigan 271 Order* ¶ 160.

[11] *Kansas-Oklahoma 271 Order* ¶ 105 (quoting *New York 271 Order* ¶ 83).

[12] *See, e.g., New York 271 Order* ¶ 86.

[13] *Louisiana I 271 Order* ¶ 25; *see also, e.g., Louisiana II 271 Order* ¶ 110.

[14] *See, e.g., New York 271 Order* ¶¶ 128-236 (extensive discussion of electronic OSS).

[15] *See, e.g., Louisiana II 271 Order* ¶¶ 165-167*; South Carolina 271 Order* ¶ 205.

[16] *New York 271 Order* ¶ 89.

[17] *Id.* ¶ 89; *Texas 271 Order* ¶ 98.

and the threat of re-monopolization would not loom so precipitously on the horizon. However, the Commission declined to follow that path. Having ruled that electronic access to UNEs (and UNE-P) was a necessary component for § 271 relief, and having now permitted § 271 relief for the vast majority of Bell company access lines across the country, it would now be unlawful for the Commission to change those rules without providing for access to UNEs in a manner that removes the significant economic impairments faced by competitive carriers in the UNE-L environment.

Although the Bell Companies have proposed that UNE-P is no longer necessary because competitors may lease loops and interconnect them with their own switches and transport networks, there is simply no significant actual commercial usage to show that the Bells have in place OSS or provisioning processes that would make this strategy operational for the mass market.[18] Nor have the Bells engaged in the kind of rigorous third-party testing that the Commission has consistently held is necessary before crediting Bell claims that their OSS and provisioning processes are sufficient to permit competitors to service the mass markets, even if that strategy were otherwise feasible. The § 271 proceedings to date have been limited to examining loop provisioning as a small subset of overall provisioning that predominantly focuses on the broad availability of UNE-P.

This failure of proof is all the more critical because the only processes that the Bells have offered in the UNE-L environment involve manual provisioning, and thus appear to create the same impassible barriers to entry as the manual OSS systems that the Commission in the § 271 process repeatedly found inadequate to meet the BOCs' obligations under § 251. The Commission may not in the Triennial Review Proceeding accept a claim regarding adequate OSS that it has repeatedly and uniformly rejected in the closely-related context of reviewing § 271 applications, particularly where it has found those requirements to be "firmly rooted in the Act,"[19] unless it is able to explain coherently why all of those previous decisions were either wrong or inapplicable. And, nothing in the record of the Triennial Review Proceeding provides the least bit of support for reversing conclusions the Commission reached based on substantial record evidence presented in the course of the § 271 application process.

Similarly, the Commission has held that Checklist Item No. 2 is only satisfied where the Bell is, in fact, making UNE-P available on a non-discriminatory and reasonable basis, finding that UNE-P is "integral to achieving Congress' objective of promoting competition in the local telecommunications markets."[20] Accordingly, the Commission has rejected Bell § 271 applications where the Bell has imposed "limitations on access to combinations of unbundled network elements [that] . . . significantly impede the development of local exchange competition."[21] In contrast, where the Bell is able to point to evidence that competitive carriers

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[18] *See, e.g., Ex Parte* Letter from CompTel and PACE Coalition to Marlene Dortch, FCC, CC Docket No. 01-338 (Oct. 31, 2002).

[19] *South Carolina 271 Order* ¶ 13.

[20] *New York 271 Order* ¶ 230.

[21] *Michigan 271 Order* ¶ 333; *South Carolina* ¶ 197.

actually use UNE-P to serve mass market customers, the Commission has found this checklist item is satisfied.[22]

Finally, and perhaps most importantly in this context, the Commission has relied upon the existence of cost-based UNE-P competition in assessing whether a § 271 application is in the "public interest." As the legislative history of the 1996 Act makes explicit, and as the Commission and the Courts have concluded, the public interest prong of § 271 requires that broad-based local competition is in fact economic and "[i]n making [a] public interest assessment, [the Commission] cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition."[23] Rather, the "public interest" requirement of § 271 imposes the additional condition that the Bell must show that local markets are *irreversibly* open to competition that is now economic.[24] And the Commission has held that "[t]he most probative evidence" on this point is hard "data" showing the extent of UNE-P usage by competitive carriers.[25] Thus, in its orders approving Bell § 271 applications, the Commission has both assured itself that the Bell is offering UNE-P *and* that there is sufficient usage of UNE-P so that the Commission can be confident that competitive carriers are, in fact, able to serve all classes of customers, especially residential and small business customers.[26]

In its recent decision in *Sprint Communications L.P v. FCC*,[27] the D.C. Circuit confirmed that § 271's public interest requirement imposes a greater limitation than the competitive checklist alone, and that the Commission must ensure that the Bell applicant will not be able to leverage its local market power anticompetitively into adjacent long distance markets. Specifically, in the Kansas-Oklahoma § 271 proceedings, AT&T contended that even if SBC's prices for UNE-P fell within the range allowed by TELRIC, they had been set at a point in the range that was too high to allow local competition for "low volume" consumers and, therefore, that long distance carriers would not be able to offer the same bundle of local and long distance services as SBC in those states. In approving SBC's § 271 application, the Commission refused to consider this evidence, arguing that it had already determined that SBC's rates were within the "zone of reasonableness" and satisfied the competitive checklist.[28] The court of appeals rejected

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[22] *See, e.g., Massachusetts 271 Order* ¶ 118; *New York 271 Order* ¶ 233; *Pennsylvania 271 Order* ¶ 74.

[23] *Michigan 271 Order* ¶ 389.

[24] *See, e.g., Kansas-Oklahoma* ¶ 267; *New York 271 Order* ¶ 423.

[25] *Michigan 271 Order* ¶ 391.

[26] *See New York 271 Order* ¶ 230 ("Because the use of combinations of unbundled network elements is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirement of section 271, we examine section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission's regulations."); *see also id.* ¶ 233; *Texas 271 Order* ¶ 5; *Massachusetts 271 Order* ¶ 3; *New Jersey 271 Order* ¶ 3; *Georgia-Louisiana 271 Order* ¶ 3.

[27] 274 F.3d 549 (D.C. Cir. 2001).

[28] *Id.* at 555.

this argument, finding that even if UNE-P rates satisfy the checklist, that by itself is *insufficient* to show that the Bell has met the independent "public interest" requirement of § 271(d)(3)(C).[29] To the contrary, the court observed that UNE-P rates might be in the zone of reasonableness but at the same time be too high to prevent effective competition for consumers.[30] The court therefore held that where UNE-P rates were too high to permit meaningful competition, the "public interest" demanded that the Commission order the Bell to lower its rates to the lower bounds of the permissible zone in order to "stimulate competition."[31] As a result of the court's *Sprint* decision, in subsequent decisions approving Bell § 271 applications, the Commission has not only found that the checklist has been met, but has also determined that there is no price squeeze, so that UNE-P is available at cost-based rates that will allow broad-based local service to residential and small business customers in competition with the Bells.[32]

In short, a fundamental predicate of the Commission's § 271 orders – and the court of appeals' review of those orders – is that UNE-P must be available at cost-based rates that are sufficient to allow competitors to serve residential and small business customers and, therefore, ensure that long distance carriers can compete on the merits with the Bells in providing residential and small business customers with the packages of local and long distance services that they demand. Conversely, if the Commission were to eliminate UNE-P in this proceeding, the essential premises of the Commission's prior authorizations of long distance services would cease to be valid. Nor is allowing the Bells to charge "market-based" UNE-P rates a solution. Until there is a wholesale market for local switching that is comparable to that which currently exists for wholesale long distance capacity, allowing the Bells to charge "market rates" would render competition on the merits impossible.[33] And because the predictable consequences of premature elimination of cost-based UNE-P – diminished local exchange competition, higher long distance prices, and expanded deadweight economic loss – are all patently contrary to the public interest, the Commission would be required to re-examine the basis for all prior § 271 authorizations pursuant to its § 271(d)(6) authority.[34]

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g., Alabama-Kentucky-Mississippi-North Carolina-South Carolina 271 Order* ¶¶ 279-92; *Georgia-Louisiana 271 Order* ¶¶ 283-290; *New Hampshire-Delaware 271 Order* ¶¶ 142-52.

[33] Indeed, if the Commission were to adopt SBC's proposed $26 per month platform charge – a price level that is demonstrated to prevent effective retail competition – it would, ironically, under the Commission's precedent preclude granting any of SBC's forthcoming § 271 petitions in the former Ameritech region.

[34] *See, e.g., Arkansas-Missouri 271 Order* ¶¶ 137-39; *New York 271 Order* ¶¶ 446-53; *Kansas-Oklahoma 271 Order* ¶¶ 283-85.

Sincerely,

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